No. 83-1935

In the Supreme Court of the United States

OCTOBER TERM, 1984

TONY AND SUSAN ALAMO FOUNDATION, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether individuals who were totally dependent upon petitioners for their support and who worked in businesses owned and operated by petitioners with the expectation of being supported by them were petitioners' "employees" within the meaning of the Fair Labor Standards Act of 1938.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 48-63), as amended by a subsequent order (Pet. App. 64-67), is not yet reported. The memorandum and order of the district court (Pet. App. 1-40) is reported at 567 F. Supp. 556. A subsequent order modifying the original order of the district court (Pet. App. 42-45) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47) was entered on December 5, 1983. Petitions for rehearing were denied on March 1, 1984 (Pet. App. 68). The petition for a writ of certiorari was filed on May 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tony and Susan Alamo Foundation is a California corporation that espouses an evangelistic philosophy and has operated numerous commercial ventures in four states (Pet. App. 1-5, 49, 51-52).[1] Petitioner Tony Alamo is President of the Foundation and directs its affairs and operations.[2] In carrying out the evangelistic and commercial purposes of the Foundation, petitioners utilized the services of "associates," individuals who subscribed to the Foundation's religious tenets and who performed most of the tasks necessary to the operation of the various businesses (*id.* at 6-7, 49-50). Although they did not expect compensation in the form of ordinary cash wages, the associates "expect[ed] the Foundation to provide them food, shelter, clothing, transportation and medical benefits" (*id.* at 8). In fact, "[t]he associates [were] entirely dependent upon the Foundation for long periods, in some cases several years" (*id.* at 7). Moreover, several former associates believed that their economic well-being had been tied to the Foundation's commercial profits; thus, "if the Foundation's businesses were successful, they would all prosper" (*id.* at 8).

2. On December 19, 1977, the Secretary of Labor filed an action against petitioners, alleging that they had violated

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[1]The Foundation's "extensive * * * and substantial" (Pet. App. 51) commercial ventures include, inter alia, the manufacture of clothing, records, and candy; the retail sale of clothing, candy, building materials, groceries, feed and farm supplies, sand, and gravel; the marketing of landscaping, record promotion, construction, vehicle repair, freight trucking, plumbing, and roofing construction services; and the operation of service stations and hog farms (*id.* at 2-5, 51-52).

[2]Until her death in 1982, petitioner Susan Alamo served as Secretary and Treasurer of the Foundation. Petitioner Larry LaRouche was Vice President of the Foundation at the time this litigation commenced, but no longer holds that office. Pet. App. 5-6, 49.

the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 206(b), 207(a), 211(c), 215(a)(2) and (5), with respect to more than 300 associates.[3] On December 13, 1982, following a bench trial, the district court issued a memorandum and order holding that petitioners had violated the FLSA's recordkeeping and minimum wage provisions and ordered injunctive and restitutionary relief. The district court found that the Foundation's businesses "operated * * * under common control for common business purposes * * * in competition with other commercial businesses" and therefore determined that they constituted an "enterprise" subject to the requirements of the FLSA (Pet. App. 35). See 29 U.S.C. 203(r). The court also found that the associates were "totally dependent upon the Foundation" for their subsistence and concluded that, as a matter of economic reality, the associates expected the Foundation to support them (Pet. App. 10, 37): "The associates contemplated they would be fed, clothed, sheltered and provided other forms of benefits as a result of their work at the Foundation's commercial businesses. Such benefits are simply wages in another form" (*id.* at 37). In addition, the court noted that several former associates expected to share in the profits of the Foundation's commercial ventures (*id.* at 8). Accordingly, the court ruled that the associates were petitioners' "employees" within the meaning of the FLSA, 29 U.S.C. 203(e)(1) and (g) (Pet. App. 37).[4]

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[3]The Secretary also charged petitioners with failing to compensate certain Foundation employees, who were not associates, at the proper overtime rate pursuant to 29 U.S.C. 207(a) (Pet. App. 29, 49). The district court made specific factual findings concerning the hours worked by each of those named employees (*id.* at 30-34), which, with one exception (*id.* at 66-67), the court of appeals upheld (*id.* at 49). Petitioners do not seek review of this portion of the case.

[4]The FLSA defines "employee" as "any individual employed by an employer," and defines "employ" as including "to suffer or permit to work." 29 U.S.C. 203(e)(1) and (g).

The district court also rejected petitioners' challenge to the constitutionality of the statute as applied to the employment of associates. The court held that application of the FLSA to the commercial activities of a nonprofit religious organization is rationally related to the statutory goal of protecting competitors against unfair competition; that there was no proof of discriminatory prosecution by the Secretary; and that application of the Act violated neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. Pet. App. 35-36.

The district court enjoined petitioners from further violations of the FLSA (Pet. App. 43-44). In computing back wages due, the court ordered that all former associates and "all persons * * * who have worked in [specified] businesses of the Foundation" be advised of their eligibility to submit a claim to the Secretary (*id.* at 44). The court further instructed the Secretary to consider all claims and submit to the Court proposed findings "of back wages due each claimant * * * less applicable benefits" that had been provided by the Foundation (*ibid.*).

3. The court of appeals affirmed the district court's holding on liability, but vacated and remanded on the remedy question (Pet. App. 66). The court of appeals agreed that the Foundation's businesses "serve[d] the general public, in competition with other private entrepreneurs" and therefore constituted an "enterprise" under the FLSA (Pet. App. 52 & n.7). The court also held that the associates, who "expect[ed] to receive * * * [the] benefits of lodging, food, transportation, and medical care" (*id.* at 50), were Foundation employees (*id.* at 53).

The court of appeals rejected petitioners' constitutional arguments as well. It held that application of the FLSA to Foundation employees did not violate the Establishment Clause because the Act is "secular social legislation of an

economic character" (Pet. App. 56) that neither advances nor inhibits religious practice and does not foster excessive government entanglement with religion (*id.* at 56-60). By the same token, the court concluded that there was no Free Exercise Clause violation because "enforcement of wage and hour provisions cannot possibly have any direct impact on [petitioners'] freedom to worship and evangelize as they please" (*id.* at 60) and because the indirect impact was merely financial (*id.* at 60-61). In short, the court stated, "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" (*id.* at 59).

Although the court of appeals upheld the district court's ruling that petitioners had violated the FLSA, it vacated the district court's order regarding the method of calculating back wages due employees. Specifically, the court rejected the district court's formula, which had required associates to initiate restitution proceedings (Pet. App. 61-63, 65). Instead, the court of appeals held that, because petitioners had failed to provide the relevant records of hours worked, the district court should utilize " 'the most accurate basis possible under the circumstances' " for calculating back wages due (*id.* at 65, quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1948)). Therefore, the court of appeals remanded the case to the district court "for determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer" (Pet. App. 66).[5]

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[5]The court of appeals also authorized the district court "to develop the record further" with respect to the status of one of the non-associate employees (see note 3, *supra*) (Pet. App. 66-67).

ARGUMENT

1. Petitioners contend (Pet. 12-26) that the court of appeals erred in holding that the Foundation associates were "employees" covered by the FLSA. At the outset, we note that it would be premature for this Court to review that contention at this time. Although the court affirmed petitioners' liability for violations of the FLSA, it remanded to the district court for further factfinding and calculation of back wages due. Should petitioners be dissatisfied with the ultimate determination of the back wages issue, they can seek appellate review at that time, and the questions presented here would still be available for review by this Court. Accordingly, there is no reason for the Court to depart from its usual practice of awaiting the completion of proceedings in the district court, rather than reviewing an interlocutory decision of the court of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). In any case, petitioners' contentions are without merit.

2.a. The thrust of petitioners' argument is that the courts below erred in holding that the Foundation associates were employees covered by the FLSA, rather than non-covered volunteers (see Pet. 16-22). Petitioners (*id.* at 14) and the Secretary both agree with the distinction set forth in *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947): an employee "contemplate[s] compensation" for the work he performs, while a volunteer works "without promise or expectation of compensation, * * * solely for his personal purpose or pleasure." Thus, petitioners' objection here is not to the general legal principles applied by the courts below, but only to their application to the particular facts of this case. Specifically, petitioners dispute the district court's factual finding, affirmed by the court of appeals, that the associates expected compensation. But that finding of fact

plainly is supported by the associates' total dependency on the Foundation (see *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954)), as well as by the expectation they had of sharing in the Foundation's profits.[6] Further review by this Court of this finding of fact is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[7]

b. Contrary to petitioners' contention (Pet. 12, 22), the decision below is fully in accord with this Court's decision in *Walling* v. *Portland Terminal Co.*, *supra*. It is true, of course, that the Foundation associates were held to be

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[6]An individual's legal status as an employee is determined by examining the factual context or "economic reality" of the individual's relationship with the employer (see *Goldberg* v. *Whitaker House Coop.*, 366 U.S. 28, 33 (1961)), rather than merely accepting the label either party may affix to that relationship. See *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729-730 (1947). Because the economic reality here was that the associates were totally dependent on the Foundation for food, shelter, clothing, transportation, and medical benefits, which is clearly compensation—albeit not in ordinary wages — petitioners' reliance (Pet. 16-19) on the testimony of the associates themselves that they intended to "volunteer" their services is misplaced.

[7]Petitioners also suggest (Pet. 21) that the district court erroneously "disregarded the voluntary nature of the associates' work simply because some of them * * * worked in activities customarily considered 'commercial.' " This is an incomplete statement of the reasoning below. In fact, the district court found that the associates performed practically *all* of the work of the Foundation's commercial businesses and that the associates were employees *because they expected compensation* for that work. That the businesses in which they worked were "engaged in ordinary commercial activities in competition with other commercial businesses" (Pet. App. 35) was relevant only to the court's conclusion that the businesses were part of an "enterprise" within the meaning of 29 U.S.C. 203(r). Indeed, the Secretary has never contended, and the decisions below plainly do not suggest, that the associates' purely religious, non-commercial activities, such as witnessing and preaching, are covered under the FLSA. See 29 C.F.R. 779.214.

employees in this case and the trainees in *Portland Terminal* were held not to be covered by the FLSA. In both cases, however, the courts used the individuals' expectation of compensation as the touchstone in determining employee status. The difference in result is attributable to the difference in the underlying facts. The courts below found that the associates expected compensation for the services they provided the Foundation, but the *Portland Terminal* Court found that there was no evidence that the trainees there "ever expected to receive • • • any remuneration for the training period" (330 U.S. at 150). Moreover, the Court in *Portland Terminal* relied heavily on the unchallenged finding that the employer there received no advantage from the work done by the trainees (see *id.* at 149-150, 153). Here, the situation is quite different because the Foundation associates performed "[p]ractically all of the work" of petitioners' commercial businesses (Pet. App. 7).

By the same token, petitioners' allegations of a confict in the courts of appeals is without foundation. In both cases relied upon by petitioners (Pet. 12, 14-16, 21-22), *Turner* v. *Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), aff'd, 602 F.2d 458 (1st Cir. 1979), and *Rogers* v. *Schenkel*, 162 F.2d 596 (2d Cir. 1947), the courts found that, under the *Portland Terminal* test, the facts did not indicate that the individuals involved expected compensation. In *Turner*, the district court dismissed the case because, inter alia, the plaintiff's "complaint indicate[d] that she never contemplated any monetary or tangible compensation" (473 F. Supp. at 377). In *Rogers*, the court of appeals simply found that an individual who "intended that his services were to be rendered without compensation" (162 F.2d at 597) and refused to accept compensation was not an employee within the meaning of the FLSA (*id.* at 597-598). Like the lower courts in this case, the courts in both *Turner* and *Rogers* correctly applied the legal standard set forth in *Portland*

Terminal to the facts at hand. See also *Mitchell* v. *Pilgrim Holiness Church Corp.*, *supra* (church workers who expected compensation covered by FLSA).

c. Petitioners' contention (Pet. 22-25) that the decision of the court of appeals will discourage persons from volunteering their services is wholly unfounded. The decision below turns on the particular facts of this case; the associates were held to be employees because they expected compensation for their services. The court of appeals explicitly recognized, however, that true volunteers, who work "without promise or expectation of compensation" (see *Walling* v. *Portland Terminal Co.*, 330 U.S. at 152), are not employees covered by the FLSA. Thus, the decision below poses no threat to the voluntary service of people like the "prosperous lawyer ringing the bell for the Salvation Army on the street at Christmas time for a few hours" or the "persons caring for children on Sunday during church services" (see Pet. App. 50).[8]

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[8]Petitioners state (Pet. 25-26) that the Secretary's enforcement of the FLSA against them contravenes constitutional principles, but make no argument in support. The courts below considered and correctly rejected this contention (see Pet. App. 35-36, 53-61). See also *United States* v. *Lee*, 455 U.S. 252 (1982). Petitioners point to no flaw in the analysis of the constitutional issues below, and there is no reason for this Court to review their undeveloped assertion of error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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